SUPREME COURT, U. S.

OCT 15 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 617

UNITED FUEL GAS COMPANY,
a corporation,
Appellant,

vs.

CHARLES H. HADEN II,
Tax Commissioner of West Virginia,
Appellee.

APPEAL FROM THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

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APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellee respectfully moves that the Court dismiss the appellant's appeal herein or, in the alternative, to affirm the final judgment of the Supreme Court of Appeals of West

Virginia rendered in this cause on the following grounds:

(1) This case is not within the appeal jurisdiction of this Court.

(2) The Federal question which the appellant seeks to have reviewed was neither timely nor properly raised by appellant nor expressly passed on by the Courts below.

(3) The decision of the Supreme Court of Appeals of West Virginia is clearly correct and no substantial Federal question is presented in this appeal.

OPINIONS BELOW

The majority opinion of the Supreme Court of Appeals of West Virginia, written for the Court by Haymond, Judge, and the concurring opinion, written for the majority of the Court by Calhoun, Judge, are printed in 167 S. E. 2d, the opinion by Judge Haymond at pages 890 to 920, and the opinion by Judge Calhoun at pages 920 to 925.

RECORD REFERENCES

References herein to the record will be made in the following manner: references to the printed record will be indicated by the capital letter R followed by the page number or numbers, as (R. ....); references to Stipulation Exhibits 1 through 131 will be made by X plus the identifying number, as (X. ....); references to the Stipulation Map Exhibits will be made by MX plus the identifying number, as (MX. ....);

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I

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A.

THE STATUTE

Reference to West Virginia statutes as the same are embodied in the West Virginia Code of 1931, as amended, will be made herein as Code Chapter ....., Article ....., Section .....

Code Chapter 11, Article 13, is the Business and Occupation Tax Statute of the State, Section 2 whereof imposes an annual privilege tax against values accruing or gross income derived from business activities conducted within the State. Separate sections of Code Chapter 11, Article 13, classify the various kinds of business activity for tax purposes and establish the rate of tax to be applied to value accruing or gross receipts derived from a particular business.

The statute of the State of West Virginia directly involved in this appeal is one of the sections of the Business and Occupation Tax law, to-wit Code Chapter 11, Article 13, Section 2d. The amendments made to this section by Chapter 167, Acts of the Legislature of 1959, are of no significance for purposes of this appeal.

Code Chapter 11, Article 13, Section 2d, originally enacted by Chapter 86, Acts of the West Virginia Legislature of 1935, and subsequently amended by Chapter 165, Acts of 1955, and by Chapter 167, Acts of 1959, none of which amendments are relevant to this appeal, provides in pertinent part:

> "Upon any person engaging or continuing within this state in any public service or utility business * * *, there is likewise hereby levied and shall be collected taxes on account of the business engaged in equal to the gross income of the business multiplied by the respective rates as follows: * * * natural gas companies, three and nine-tenths per cent on the gross income * * *. The measure of this tax shall not include gross income derived from commerce between this state and other states of the United States or between this state and foreign countries. The measure of the tax under this section shall include only gross income received from the supplying of public services. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed upon the appropriate section or sections of this article."

B.

THE PROCEEDINGS BELOW

This case originated in an administrative decision or ruling by the Tax Commissioner of West Virginia which held the appellant herein, United Fuel Gas Company, liable to the State for unpaid Business and Occupation Tax and penalty under several sections of Code Chapter 11, Article 13, on account of appellant's business activities conducted within the State.

The appellant appealed the Tax Commissioner's administrative determination to the Circuit Court of Kanawha County, West Virginia, which appeal resulted in the development by the parties of fourteen (14) separate Agreed Issues of law for submission to the Court, embodied, numbered 1 through 14, respectively, in a document entitled "Stipulation Submitting Agreed Issues and Admitting Facts But Reserving Right to Object to Relevancy and Materiality." (R. 76.)

The Agreed Issues were resolved by the Circuit Court by its order of the 21st day of April, 1967, (R. 207 through 214), the reasons therefor being set forth in its Memorandum of Opinion bearing date the 24th day of January, 1967 (R. 215 through 262). Some of the Agreed Issues were decided for the appellant and against the Tax Commissioner while others were decided for the Tax Commissioner and against the appellant.

The Tax Commissioner appealed the decision of the Circuit Court with respect to Agreed Issues Nos. 1, 10, 12 and 13, decided against him, to the Supreme Court of Appeals of West Virginia, the highest Appellate Court of the State. The appellant cross-appealed with respect to certain of the Agreed Issues which had been decided by the Circuit Court against it.

The Supreme Court of Appeals, by the opinion of the majority of the four judges who considered the case (one judge dissenting), reversed the Circuit Court on all of the Agreed Issues decided by that Court against the Tax Commissioner, with the exception of Agreed Issues Nos. 12 and 13, which pertained to the

imposition of penalties, and affirmed the Circuit Court on all of the Agreed Issues presented by appellant on its cross-appeal which that Court had decided for the Tax Commissioner and against the appellant. See the opinion of Haymond, Judge, 167 S. E. 2d 890 to 920, and the concurring opinion of Calhoun, Judge, 167 S. E. 2d 920 to 925.

Although Judge Haymond was the author of the Court's opinion, he dissented therefrom to the extent that the opinion reversed the decision of the Circuit Court with respect to Agreed Issue No. 10. See 167 S. E. 2d 917.

The appellant petitioned the Supreme Court of Appeals of West Virginia for rehearing on that portion of its decision which reversed the ruling of the Circuit Court on Agreed Issue No. 10. This petition was denied by order of the Supreme Court of Appeals entered on the 24th day of June, 1969.

The appellant's appeal to this Court is confined to that portion of the decision of the West Virginia Supreme Court of Appeals which reversed the ruling of the Circuit Court on Agreed Issue No. 10. See Jurisdictional Statement, pp. 1, 2; Notice of Appeal, (TR. 1710).

Agreed Issue No. 10 pertains to taxation of appellant's gross income under Code Chapter 11, Article 13, Section 2d, derived from its sales, to three large industrial customers, of natural gas imported into West Virginia from other states. This gas, delivered in West Virginia by appellant from its transmission pipelines, was sold to these customers for use or consumption in their plant operations located within this State, *not for the purpose of resale by them.*

C.

THE NATURE OF APPELLANT'S BUSINESS ACTIVITIES

The business activities of the appellant in West Virginia with which this appeal is concerned involves the sale by appellant, under special contracts to the E. I. du Pont de Nemours and Company (du Pont), Elk Refining Company (Elk) and Kaiser Aluminum & Chemical Corporation (Kaiser), of natural gas which had been imported, prior to sale by appellant, into the State and delivered by appellant to said customers through its transmission pipelines. The du Pont, Elk and Kaiser companies are all located within appellant's West Virginia utility service territory. (MX. 153.) The gas was delivered to these customers on their premises in West Virginia through appellant's pipeline facilities and was there measured by metering devices owned by appellant.

Appellant is a corporation chartered under the laws of the State of West Virginia, originally incorporated as Kermit Gas Company on February 1, 1916. The name of appellant was changed to United Fuel Gas Company by amendment to its corporate charter on the 14th day of March, 1916. At all times relevant to this appeal and for many years prior thereto, appellant has been principally engaged in the production, purchase, transmission, distribution and sale of natural gas at both wholesale and retail and also engaged in the leasing of other tangible personalty. These activities have been carried on in West Virginia as well as in other states. In carrying out some of its corporate objects and purposes in West Virginia, appellant has always been a natural gas company en-

gaged in business in the State as a public utility regulated by the Public Service Commission of West Virginia. In carrying out other objects and purposes plaintiff has always been a natural gas company within the meaning of the Natural Gas Act, 15 USCA, Sections 717 through 717w, and, as to such business, been regulated since the year 1938 by the Federal Power Commission. (R. 89.) In addition to the three customers mentioned above, appellant's customers located in West Virginia are private persons as well as commercial and industrial concerns, all of whom consume the gas purchased from appellant, and also other gas companies purchasing natural gas from appellant for resale, both within and outside of West Virginia. Appellant's West Virginia utility service territory is approximated on (MX. 153) and had a 1961 population of 414,130 (R. 89).

Approximately 80% of appellant's property classified by the Public Service Commission of West Virginia as Gas Plant in Service was located in this State at year end 1961. The total depreciated original cost of appellant's Gas Plant in Service at year end 1961 was $165,786,314, the portion thereof located in West Virginia being valued at $132,892,508. This property included land, leaseholds, production gas wells, compressor stations, regulators, meters, pipelines of varying sizes and function, underground storage facilities, hydrocarbon products extraction plants, machinery, office furniture and equipment, and other property (X. 26, pp. 501-A through 504-A). In the year 1961 appellant's gross income from all sales of gas was $214,673,623, with gas sales of all kinds at West Virginia delivery points accounting for $109,465,235 thereof (R. 92).

By far the greater portion of the total volume of natural gas sold by appellant in West Virginia to its retail and wholesale customers is imported into this State from other states, principally Southwest gas produced in Texas and Louisiana and, to a much lesser extent, Appalachian gas produced in Kentucky and Virginia (X. 2). At all times relevant to this appeal, the Southwest gas was acquired by appellant in two ways, to-wit: (1) the purchase by appellant of Southwest gas for resale from Tennessee Gas Transmission Company, which company acquired gas from fields located in Texas and Louisiana and transported such gas through pipelines, in continuous streams to the points of sale and delivery to appellant in West Virginia and Kentucky; and (2) the purchase by appellant of natural gas for resale from operators of wells located in southern Louisiana, which volumes were transported for appellant in continuous streams to delivery points in Kentucky through pipelines owned and operated by Columbia Gulf Transmission Company (R. 95). That portion of the Southwest gas involved in this appeal, which appellant received in Kentucky, was transported by appellant by means of its own pipelines into West Virginia (Delivery Point 2, MX. 134, MX. 135). An overall view of appellant's West Virginia facilities as of December 31, 1961, is presented on (MX. 132) (R. 94).

Gas from all of the sources above-described makes up the common supply of gas, including those portions injected into and withdrawn from underground storage in West Virginia with which appellant served all of its West Virginia customers, both retail and wholesale, through a completely integrated system of pipelines and other facilities. These facilities are all equally

available to serve all of appellant's West Virginia customers without distinction as to customer or designation or classification of facility (R. 96).

The operational details of the gas deliveries to the three industrial customers with which this appeal is concerned are delineated on the Stipulation Map Exhibits as follows: du Pont (MX. 134, MX. 154, MX. 135); Elk (MX. 134, MX. 135, MX. 155, MX. 156); Kaiser (MX. 134, MX. 135, MX. 157).

II

ARGUMENT

1.

THIS CASE IS NOT WITHIN THE APPEAL JURISDICTION OF THIS COURT.

This is an attempted appeal brought under 28 USCA §1257(2) from a decision of the Supreme Court of Appeals of the State of West Virginia upholding a Business and Occupation Tax Assessment against the appellant, made under the provisions of Code Chapter 11, Article 13, Section 2d, on the ground that the assessment infringes upon appellant's Federal rights, privileges or immunities. The appellate jurisdiction of this Court does not extend to an action of this nature. *Charleston Federal Savings & Loan Association, et als.* v. *Alderson*, 324 U. S. 182, 65 S. Ct. 624, 89 L. ed. 857 (1945); *Rohr Aircraft Corp.* v. *County of San Diego*, 362 U. S. 628, 80 S. Ct. 1050, 4 L. ed. 2d 1002, (1960). Furthermore, the appellant did not draw into question the validity of the statute of the State of West Virginia on which the tax assessment was based on the

ground of its being repugnant to the Constitution, treaties or laws of the United States in the Courts below, and consequently no appeal will lie. *Anonymous Nos. 6 and 7* v. *Baker*, 360 U. S. 287, 79 S. Ct. 1157, 3 L. ed. 2d 1234 (1959).

The decision below is reviewable, if at all, by writ of certiorari under 28 USCA § 2103. Accordingly, the appeal should be dismissed and, treating the papers as an application for a writ of certiorari, the writ should be denied.

2.

THE FEDERAL QUESTION WHICH THE APPELLANT SEEKS TO HAVE REVIEWED WAS NEITHER TIMELY NOR PROPERLY RAISED BY APPELLANT, NOR EXPRESSLY PASSED ON BY THE COURTS BELOW.

Although the appellant sets forth two questions in the Jurisdictional Statement, pp. 3 and 4, as grounds for conferring jurisdiction upon this Court, these questions are, in reality, one question, i.e. whether or not the Commerce Clause of Article 1, Section 8 of the United States Constitution forbids the State of West Virginia from taxing the sale of natural gas by appellant to the du Pont, Elk and Kaiser companies under the facts of this case.

This question was not raised by appellant in the State Courts below wherein the validity of the state statute involved was never challenged. In those Courts the appellant did not assert Federal constitutional pro-

hibitions to defeat imposition of the tax, but relied instead upon specific language of the taxing statute:

> "* * *. The measure of this tax shall not include gross income derived from commerce between this State and other states of the United States or between this State and foreign countries. * * *."

See Code Chapter 11, Article 13, Section 2d.

In its appeal to the Circuit Court of Kanawha County from the administrative decision of the Tax Commissioner (R. 14 through 48), the appellant assigned as error the ruling of the Commissioner that appellant's sales of natural gas to du Pont, Elk and Kaiser were taxable as utility sales under Code Chapter 11, Article 13, Section 2d, in the following language at (R. 43):

> "ASSIGNED ERROR 9
>
> "United Fuel assigns as error the inclusion and assertion of taxability under Section 2d of the Tax Statute of any gross income from deliveries of gas in interstate commerce to special contract industrial customers directly from United Fuel's interstate transmission pipeline system, *on the ground that the plain language of Section 2d excludes such gross income from taxation thereunder by providing, 'The measure of this tax (of Section 2d) shall not include gross income derived from commerce between this state and other states of the United States.'*" (Emphasis supplied.)

This assigned error was formulated by the parties for decision by the Circuit Court into the Agreed Issue

No. 10 (R. 85) with which this appeal is concerned. Agreed Issue No. 10 is couched in the following language:

> "AGREED ISSUE NO. 10
>
> "Re Special Industrial Contract Sales of Gas
>
> "Does Tax Section 2d, in providing inter esse that 'The measure of this tax shall not include gross income derived from commerce between this state and other states of the United States.', thereby exclude from taxation under any Tax Section of the statute United Fuel's gross income from sale of gas under special industrial contracts directly from United Fuel's transmission pipelines to—
>
> "(a) E. I. du Pont de Nemours and Company,
>
> "(b) Elk Refining Company, and
>
> "(c) Kaiser Aluminum & Chemical Corporation
>
> "—in view of the particular facts, including the role of underground storage, involved in the sales and deliveries to each?" (Emphasis supplied.)

The Circuit Court in rendering its opinion with respect to Agreed Issue No. 10 (R. 250 through 255) understood that appellant was relying upon the exclusionary language of the taxing statute itself, rather than upon the Commerce Clause of Article I, Section 8 of the United States Constitution:

> "The primary contention of the plaintiff is that the exclusionary provision of the statute does not merely limit the application of the tax of Section 2d to sales which could be taxed without

impinging upon the Commerce Clause of the Constitution, but that all sales in interstate commerce are *thereby* excluded. The threshold question, therefore, is whether or not the sales involved in Agreed Issue No. 10 were in fact sales in interstate commerce." (Emphasis supplied.)

(R. 251.)

"Thus, the determinative question upon Agreed Issue No. 10 is whether such sales in interstate commerce come within the exclusion of Section 2d, which provides that the measure of the tax 'shall not include gross income derived from commerce between this state and other states of the United States.'" (Emphasis supplied.)

(R. 252.)

The appellant made no contention in the Supreme Court of Appeals of West Virginia that imposition of the tax under Code Chapter 11, Article 13, Section 2d was violative of Article I, Section 8 of the Commerce Clause of the United States Constitution. In that Court, as in the Circuit Court, the question presented by Agreed Issue No. 10 was the legislative intent to be deduced from the exclusionary language of Code Chapter 11, Article 13, Section 2d. See the opinion of Haymond, Judge, 167 S. E. 2d 890 to 920, at page 917:

"* * * The question presented by that issue [Agreed Issue No. 10] and here under consideration is not the validity of a state tax on interstate commerce in the absence of an exclusionary state statute which exempts such commerce from

> taxation but the validity of a tax on interstate commerce under a taxing statute of this State which provides that the measure of the tax shall not include gross income derived from commerce between this State and other states of the United States or between this State and foreign countries. To say that the tax in question is valid because it does not burden but is merely incidental to interstate commerce is to ignore and not determine the question presented by Issue No. 10 which, of course, is whether, if the transportation under the cited cases is taxable interstate commerce, the income derived from such commerce is exempt from taxation by the exclusionary provision of Section 2d of the statute of this State. * * *" (Bracketed material supplied.)

As a matter of fact, appellant vigorously contended in the West Virginia Supreme Court of Appeals that no Federal Constitutional question was involved respecting the applicability of the taxing statute to its sales of natural gas to the three industrial customers concerned. See the opinion of Calhoun, Judge, 167 S. E. 2d 920 to 925, at pages 920, 921:

> "By the brief filed in behalf of United Fuel Gas Company (which hereafter in this opinion may be referred to as United Fuel) and by the amici curiae brief, as well as by oral argument of counsel by whom such briefs were filed, it has been vigorously urged that the stipulated issue in question is not concerned with the question whether the tax involves the Commerce Clause of Article I, Section 8 of the Constitution of the United States. Indeed, counsel, by brief and oral argument, have displayed a degree of impatience with the action of counsel for the defendant [Tax Commissioner] in asserting that imposition of

the tax here in question is not in violation of the Commerce Clause.

"The Court's opinion makes clear that Agreed Issue No. 10, does not involve the constitutional question, but that it involves only the validity of the tax when considered in relation to the provisions of Code, 1931, 11-13-2d, as amended, a statute which provides for payment of a tax, commonly referred to as a Business and Occupation Tax, 'Upon any person engaging or continuing *within this State* in any public service or utility business, * * *.' (Italics supplied.) The language relied upon by United Fuel is a sentence included in the statute which, so far as pertinent, is as follows: 'The measure of this tax shall not include *gross income derived from commerce* between this State and other states of the United States * * *.' (Italics supplied.)

"* * *. Nevertheless, the counsel for the taxpayers earnestly urge that the tax is in contravention of the statutory provision and yet strenuously insist that, in considering the validity of the tax, the Commerce Clause is not material in any sense or degree." (Bracketed material supplied.)

* * *

"* * * this issue does not involve a constitutional question, but rather the application and effect of the clear language of the statute."

Rule VI of the Rules of the Supreme Court of Appeals of West Virginia provides that no alleged error or point not set forth in the brief shall be raised thereafter either by reply brief or on oral or printed argument or on petition for rehearing. In its petition for rehearing (TR. 1673) from the judgment of the Su-

preme Court of Appeals of West Virginia appellant did not attack the constitutional validity of the taxing statute, but had such attempt been made, it would have been barred by the rule of the Court.

The initial challenge which appellant made to the constitutional validity of the taxing statute was in the Notice of Appeal to the Supreme Court of the United States. (TR. 1710.)

This Court has consistently ruled that before its jurisdiction can be invoked on appeal or certiorari from a state court it must appear that the Federal question involved was raised in the State Court at the proper time. The Federal question may not be raised for the first time in the notice of appeal to this court or in the Jurisdictional Statement. *Ker* v. *California*, 374 U. S. 23, 44, 83 S. Ct. 1623, 10 L. ed. 2d 726, 744 (1963); *Raley* v. *Ohio*, 360 U. S. 423, 434, 435, 79 S. Ct. 1257, 3 L. ed. 2d 1344, 1353, 1354 (1959); *White River Lumber Co.* v. *State of Arkansas*, 279 U. S. 692, 700, 49 S. Ct. 457, 73 L. ed. 903, 911 (1929); *Hiawassee River Power Co.* v. *Carolina-Tennessee Power Co.*, 252 U. S. 341, 40 S. Ct. 330, 64 L. ed. 601 (1920); *Whitney* v. *California*, 274 U. S. 357, 47 S. Ct. 641, 71 L. ed. 1095 (1927); *Thomas* v. *Iowa*, 209 U. S. 258, 28 S. Ct. 487, 52 L. ed. 782 (1908); *Slagle* v. *State of Ohio*, 366 U. S. 259, 81 S. Ct. 1076, 6 L. ed. 2d 277 (1961); *Charleston Federal Savings & Loan Association, et als.* v. *Alderson*, 324 U. S. 182, 65 S. Ct. 624, 89 L. ed. 857 (1945).

3.

THE DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA IS CLEARLY CORRECT AND NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED IN THIS APPEAL.

The decisions of this Court and the Natural Gas Act, 15 USCA, Sections 717 through 717w, enacted pursuant to those decisions, demonstrate that the State of West Virginia is not prohibited by the Commerce Clause of the United States Constitution from exercising the functions of taxation and regulation upon the sale of natural gas by appellant, a resident public utility, delivered by way of appellant's transmission pipelines, to resident industrial customers located within its utility service territory in this State, who consume such gas in their businesses and do not purchase the same for resale, which gas, prior to such sale and delivery by appellant was imported into West Virginia from other states.

Prior to enactment of the Natural Gas Act in 1938 this Court in a series of decisions had dealt with various situations arising from state efforts to regulate or tax the sale of imported natural gas. See *Illinois Natural Gas Co.* v. *Central Illinois Public Service Company*, 314 U. S. 498, 62 S. Ct. 384, 86 L. ed. 371 (1942); *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507, 68 S. Ct. 190, 92 L. ed. 128 (1947). These decisions established the Commerce Clause standard against which the constitutionality of a state tax on this kind of transaction can be tested. The standard is quite simple, i. e., the sale of imported gas which has moved in interstate commerce

to a *consumer* is local business separated from the national commerce and, as such, fully amenable to state taxation, whereas taxation of the sale of such gas to a distributor for resale in the taxing state or elsewhere is forbidden as being beyond the reach of state power. *Public Utilities Commission for the State of Kansas* v. *Landon*, 249 U. S. 236, 39 S. Ct. 268, 63 L. ed. 577 (1919); *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23, 40 S. Ct. 279, 64 L. ed. 434 (1920); *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, 44 S. Ct. 544, 68 L. ed. 1027 (1924); *Public Utilities Com.* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83, 47 S. Ct. 294, 71 L. ed. 549 (1926); *East Ohio Gas Co.* v. *Tax Commission of Ohio*, 283 U. S. 465, 51 S. Ct. 499, 75 L. ed. 1171 (1931); *State Tax Commission* v. *Interstate Natural Gas Co.*, 284 U. S. 41, 52 S. Ct. 62, 76 L. ed. 156, (1931); *Southern Natural Gas Corporation* v. *Alabama*, 301 U. S. 148, 57 S. Ct. 696, 81 L. ed. 970 (1937).

The principle enunciated by the cases cited above was carried over into the Natural Gas Act. Subsection (b) of Section 717 which determines the Act's coverage, provides that it shall not apply to any sales other than sales "for resale for ultimate public consumption for domestic, commercial, industrial, or any other use." Direct sales for consumptive use of whatever sort were excluded. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana, supra.* The charge or rate which appellant makes to the three subject industrial customers for the gas sold to them is fixed by contract between the parties, not by the Federal Power Commission.

Thus, the conclusion reached by the majority of the West Virginia Supreme Court of Appeals that appellant's gas sales to the du Pont, Elk and Kaiser companies, for consumptive use by those customers, and not for resale, are merely a species of its local business divorced from the national commerce, is in complete harmony with the decisions of the United States Supreme Court, extending in a uniform line of adjudications on this subject from the year 1919 to the present. *El Paso Electric Co.* v. *Calvert, et al.*, 385 S. W. 2d 542 (Tex. 1965) appeal dismissed per curiam, October 11, 1965, for want of substantial Federal question, 382 U. S. 18, 86 S. Ct. 89, 15 L. ed. 2d 15. For the reason that these gas sales are local business of appellant in West Virginia, they are subject to the Business and Occupation Tax to the same extent as any other local business activity carried on within the State. The circumstances of this case plainly present no Commerce Clause question and, accordingly, no need for further review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal be dismissed, or the decision of the Supreme Court of Appeals of West Virginia be affirmed.

Respectfully submitted,

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